(1)

Supreme Court, U.S.
FILED

No. _____

02 795 SEP 16 2002

OFFICE OF THE CLERK

In The
SUPREME COURT of the UNITED STATES

ANGIE FROST
Petitioner

v.

JOHN HARPER; MICHAEL "MIKE" SIDES; ROBERT JOSEPH KOSTELINK; and CITGO REFINING AND CHEMICAL COMPANY, LP
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

REGINA BACON CRISWELL
Counsel of Record
Carriage Place
P.O. Box 1399
Helotes, Texas 78023-1399
(210) 543-8940
(210) 543-9489 (facsimile)

RENÉ RODRIQUEZ
433 S. Tancahua
Corpus Christi, Texas 78401
(361) 882-1919

55 pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit has departed from the accepted and usual course of judicial proceedings in dismissing Petitioner's Appeal for want of prosecution, as to call for the exercise of this Court's supervisory power?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Angie Frost, Plaintiff/Petitioner

2. John Harper, Michael "Mike" Sides, Robert Joseph Kostelink, and Citgo Refining and Chemicals Company, LP, Defendants/Respondents

3. Regina Bacon Criswell, and René Rodriguez, Attorneys for Plaintiff/Petitioner

4. Mr. Stanley Weiner, and JONES, DAY, REAVIS & POGUE and Mr. Ralph Meyer and ROYSTON, RAYZOR, VICKERY & WILLIAMS, Attorneys for Defendants/Respondents

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION 1

LAW AND RULES APPLICABLE 1-2

STATEMENT OF THE CASE 2-4

SUMMARY OF THE ARGUMENT 5-6

ARGUMENT 5-16

CONCLUSION 16-17

APPENDIX .....

-Dismissal of appeal for want of prosecution 1-2

-Order Denying Motion to Reinstate Appeal 3-4

-Order Denying Motion for Reconsideration of Order Denying Motion to Reinstate Appeal 5-6

-Order Denying Motion to Remand and Dismissing Certain Claims 7-18

-Order Granting Motion to Dismiss 19-30

TABLE OF AUTHORITIES

Cases **Page**

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 8, 9,10

Baker v. Farmers Elec. Coop., Inc., 34 F.3d 274 (5th Cir. 1994) 7

Callip v. Harris County Child Welfare Dept., 757 F.2d 1513, 1519 (5th Cir. 1985) 15

Carroll v. Jaques Admiralty Law Firm, 110 F.3d 290 (5th Cir. 1997) 15

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 8,12

Chambers v. NASCO, Inc., 501 U.S. 32, 35, reh'g denied 501 U.S. 1269 (1991). 14

Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981). . 13

Electrical Workers v. Hechler, 481 U.S. 851(1987) 8

Evans v. City of Houston, 246 F.3d 344, 349 (5th Cir. 2001) 8

Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962) 12,13

Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1 (1983) 8

Gonzalez v. Trinity Marine Group, Inc., 117 F.3d 894 (5th Cir.1997) 14, 15

In Re United Markets Int'l, Inc., 24 F.3d 650, 654 (5th Cir.) *cert denied*, 513 U.S. 946 (1994) 15

Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 524 (5th Cir.1994)... 12

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 9,10,11

Link v. Wabash Railroad Co., 370 U.S. 626, 629 (1962).....13,14

Lividas v. Bradshaw, 512 U.S. 107 (1994) 11

Martin's Herend Imports, Inc. v. Diamond Gem Trading U.S. Am. Co., 195 F.3d 765, 770 (5th Cir. 1999) 12, 13

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. at 65 8

Pressey v. Patterson, 898 F.2d 1018, 1021 (5th Cir. 1990).....15

Reece v. Houston Lighting & Power Company, 79 F.3d 485 (5th Cir. 1996) 7,8,15

San Diego Unions v. Garmon, 359 U.S. 236, 242 (1959) 9

Stripling v. Jordan Production Co., LLC, 234 F.3d 863 (5th Cir. 2000) 12,13

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 9

Trevino v. Levi Strauss & Co., 197 F.3d 777 (5th Cir. 1999) 11

Whitmire v. Victus Ltd., 212 F.3d 885(5th Cir. 2000) 12

Statutes and Rules

28 U.S.C. § 1254(1) 1

29 U.S.C. § 185(a), §301 Labor Management Relations Act .....
..... 2,3,7,8,9,10,11

Fifth Circuit Rule 42.3.1.1 1,5,6,13,15,16

Fed. R. Civ.P. 15(a) 2,12

STATEMENT OF JURISDICTION

The Clerk of the United States Court of Appeals for the Fifth Circuit entered judgment as the mandate dismissing Petitioner's appeal for want of prosecution on April 11, 2002. (App 1-2) The Court of Appeals entered an Order denying Appellant's Motion to Reinstate Appeal on May 7, 2002 (App 3-4); and then Denied Appellant's Motion for Reconsideration of Order Denying Motion to Reinstate Appeal on June 18, 2002 (App 5-6). The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

THE LAW AND RULES APPLICABLE TO THE CASE

Fifth Circuit Rule 42.3.1.1 states:

> "If appellant is represented by appointed or retained counsel, the clerk shall issue a notice to counsel that, upon expiration of 15 days from the date of the notice, the appeal may be dismissed for want of prosecution unless prior to that date the default is remedied, and must enter an order directing counsel to show cause within 15 days from the date of the order why disciplinary action should not be taken against counsel. If the default is remedied within that time, the clerk must not dismiss the appeal and may refer to the court the matter of disciplinary action against the attorney. If the default is not remedied within that time, the clerk may enter an order dismissing the appeal for want of prosecution or may refer to the court the question of dismissal. The clerk must refer to the court the matter of disciplinary action against the attorney. The court may refer the matter of disciplinary action to a special master including but not limited to a district or magistrate judge."

Section 301 of the Labor Management Relations Act states:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce...may be brought in any district court of the United States having jurisdiction of the parties..." 29 USC 185(a).

Federal Rule of Civil Procedure 15(a) states:

> "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires...."

STATEMENT OF THE CASE

Petitioner, Angie Frost brought suit against Citgo Refining and Chemicals Company, LP (hereinafter referred to as Citgo) and the individual Defendants in connection with her termination on January 12, 2000 after approximately seventeen (17) years of employment with Respondent Citgo. Petitioner was a member of a Union, and her employment was governed by a Collective Bargaining Agreement (hereinafter referred to as CBA). After Plaintiff was terminated she invoked the grievance process and ultimately the arbitration provisions provided for in the CBA, and the arbitrator ruled in favor of Citgo. Petitioner filed suit in state court alleging various causes of action, including a claim for discrimination and retaliation under the

Texas Labor Code. Respondents removed the suit to federal court on the basis of §301 pre-emption under the Labor Management Relations Act. Petitioner filed a Motion to Remand in opposition to Defendant's Removal.

The District Court denied Plaintiff's Motion to Remand and dismissed sua sponte, some of Plaintiff's claims without prejudice to refile, and found the remaining claims were pre-empted under §301 of the Labor Management Relations Act. Thereafter, the District Court entered a Final Order dismissing some of Plaintiff's claims without prejudice. The case proceeded forward pursuant to the District Court's scheduling order, and dispositive motions were filed, including Plaintiff's Motion for Partial Summary Judgment and Defendants Motion to Dismiss and Motion for Summary Judgment. In response to the Motion to Dismiss, Plaintiff filed a Motion for Leave to File Amended Complaint, which was denied by operation of law. The Court granted Defendants' Motion to Dismiss, and entered a final order dismissing the case. Plaintiff filed a Motion for New Trial and Motion to Alter or Amend the Judgment, which the Court denied. The Court entered an Amended Order denying Plaintiff's Motions on December 21, 2001, and Plaintiff filed her Notice of Appeal on January 18, 2002.

After the Notice of Appeal was filed, counsel submitted a representation statement and designation of items to be included in the record and certificate regarding the transcript on January 28, 2002. Counsel then received correspondence from the Fifth Circuit Court of Appeals dated February 1, 2002 which stated that the appeal had been docketed, and that information concerning briefing of the appeal would be sent at a later date. Thereafter, counsel submitted an original appearance form and appellate conference form for filing.

On February 14, 2002, counsel received notification from the United States District Court for the Southern District of Texas that the record on appeal was transmitted to the Fifth Circuit Court of Appeals, which was subsequently delivered to attorney René Rodriguez on March 25, 2002. Counsel for Petitioner calculated the deadline to file Appellant's Brief for April 24, 2002, thirty (30) days from receipt of the record. On April 11, 2002, counsel for Petitioner sent correspondence to counsel for Respondents in an attempt to confer regarding a Motion for Extension of Time to File Appellant's Brief due to upcoming jury trials scheduled to begin April 15 and April 29 respectively.

On April 12, 2002, the undersigned attorney received a telephone call from the Clerk of the Fifth Circuit Court of Appeals regarding the status and location of the record, and during that conversation learned that the deadline to file the Appellant's Brief was April 1, 2002, and that the case was scheduled for dismissal for want of prosecution. According to the clerk, correspondence dated February 18, 2002, set forth the briefing schedule and had been mailed to the undersigned attorney. The undersigned attorney advised the clerk that the February 18, 2002, correspondence had never been received. Later that same day, the undersigned attorney spoke with the Court of Appeals case manager and learned that the case had already been dismissed on April 11, 2002 for want of prosecution.

On April 12, 2002, the undersigned attorney filed a Motion to Reinstate the Appeal on the ground that the failure to file the brief timely, or to request an extension before the deadline was due to the fact that the briefing schedule had not been received by counsel for Appellant. Appellant's Brief and Record Excerpts was submitted for filing on April 19, 2002.

ARGUMENT

The Fifth Circuit Court of Appeals' decision to dismiss Petitioner's appeal for want of prosecution and in denying her Motion to Reinstate Appeal and Motion for Reconsideration of Order Denying Motion to Reinstate Appeal so far departs from the accepted and usual course of judicial proceedings that this Court should exercise its supervisory power to review the Court of Appeals decision.

On April 11, 2002, the Clerk of the Fifth Circuit Court of Appeals sent a certified copy of the judgment issued as the mandate to the United States District Court which states "under 5th Cir. R. 42.3, the appeal is dismissed as of April 11, 2002 for want of prosecution. The appellant failed to timely file brief and record excerpts." (App 1-2) The Fifth Circuit Court Clerk sent a copy of this notice to counsel for Appellant on April 15, 2002, which was received on April 19, 2002. 5th Cir. R. 42.3.1.1 governs dismissal for failure to prosecute when appellant is represented by counsel, and specifically provides as follows:

> "If appellant is represented by appointed or retained counsel, the clerk shall issue a notice to counsel that, upon expiration of 15 days from the date of the notice, the appeal may be dismissed for want of prosecution unless prior to that date the default is remedied, and must enter an order directing counsel to show cause within 15 days from the date of the order why disciplinary action should not be taken against counsel. If the default is remedied within that time, the clerk must not dismiss the appeal and may refer to the court the matter of disciplinary action against the attorney. If the default is not remedied within that time, the clerk may enter an order dismissing

> the appeal for want of prosecution or may refer to the court the question of dismissal. The clerk must refer to the court the matter of disciplinary action against the attorney. The court may refer the matter of disciplinary action to a special master including but not limited to a district or magistrate judge."

Petitioner's counsel never received the notice required by 5th Cir. R. 42.3.1.1. Counsel was never afforded an opportunity to cure the default as required by 5th Cir. R. 42.3.1.1, and in fact did cure the default within 15 days of notice that the appeal was dismissed for want of prosecution. The Court of Appeals failed to comply with its own rule by failing to provide the notice required by rule 42.3.1.1 and in dismissing the appeal despite that the default was cured within the time specifically contemplated by the rule.

Grounds for Appeal to the Fifth Circuit

Petitioner's appeal to the Fifth Circuit Court of Appeals was premised on the District Court's finding that her state law discrimination claims were inextricably intertwined with a collective bargaining agreement, such that the Court would be required to "interpret" the agreement to determine whether Respondents' legitimate, non-discriminatory reasons for terminating Petitioner were pretextual. A second basis of Petitioner's appeal was the District Court's refusal to allow Petitioner Leave to File an Amended Complaint in response to a Motion to Dismiss.

Preemption is a question of law reviewed de novo. *See Reece v. Houston Lighting & Power Company*, 79 F.3d 485, 487 (5th Cir. 1996) cert. denied 117 S.Ct. 171, 136 L.Ed.2d 112 (1996); *Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 278 (5th Cir. 1994).

Ordinarily, pre-emption is plead defensively, and does not serve as the basis for federal question jurisdiction. However, the complete pre-emption doctrine provides that if the pre-emptive force of a statute converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well pleaded complaint rule, then federal question jurisdiction exists. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987), citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 65.

The complete pre-emption doctrine is primarily applied in cases raising claims that are pre-empted by §301 of the LMRA. Essentially, if a state law claim in any respect alleges a violation of a collective bargaining agreement, the claim is a federal question and all state law claims on that basis are preempted. *See Caterpillar*, 482 U.S. at 394 citing *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 23 (1983). § 301 of the LMRA governs claims founded directly on rights created by collective bargaining agreements, and also claims "substantially dependent on analysis of a collective bargaining agreement." *See Caterpillar*, 482 U.S. at 394 citing *Electrical Workers v. Hechler*, 481 U.S. 851, 859 n. 3 (1987); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). However, § 301 does not pre-empt state laws that proscribe conduct, or establish rights and obligations, independent of a labor contract. *See Allis Chalmers Corp.*, 471 U.S. at 212.

In the instant case, relying on *Reece*, 79 F.3d 485 (5th Cir. 1996), the District Court held that because Defendants will point to the CBA as part of its legitimate, non-discriminatory reason for terminating the Plaintiff, the Court will have to look to the CBA to determine whether the claim of abuse of sick leave was pretextual, and therefore Plaintiff's discrimination claims are pre-empted. Defendants' legitimate, nondiscriminatory reason for terminating Plaintiff was her alleged failure to cooperate in the company's investigation of her abuse of sick leave. Plaintiff

was not terminated for abuse of sick leave, essentially she was terminated for claimed insubordination. Whether or not an employee was insubordinate is primarily a subjective determination, not at all dependent upon "interpretation" of the CBA. Moreover and more importantly, whether or not the Defendants' proffered legitimate, nondiscriminatory reason for terminating Plaintiff is a pretext for discrimination is not in any respect dependent upon "interpretation" of any provision of a collective bargaining agreement.

In considering the principles of federal pre-emption, courts are primarily concerned with preventing potential conflict of rules of law, remedies, and administration which might result when two different law-enforcing authorities, one state and one federal, consider issues that involve the special problems of labor-management relations. *See San Diego Unions v. Garmon,* 359 U.S. 236, 242 (1959). "If the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles- necessarily uniform throughout the nation- must be employed to resolve the dispute." *See Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399, 405-06 (1988), citing *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985) and *Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962).

In *Lingle,* the plaintiff asserted a state law claim of workers compensation retaliation in connection with her termination. The employer raised pre-emption defensively since the plaintiff's employment was governed by a collective bargaining agreement. The trial court and the appellate court both concluded the state law retaliation claim was pre-empted under section 301, since her state law claim was "inextricably intertwined" with the collective bargaining agreement. This

Court reversed, finding that the state law claim was "independent" of the collective bargaining agreement since resolution of the claim did not require the courts to construe the agreement. *See Lingle*, 486 U.S. at 407-08.

This Court has observed that purely factual questions regarding the conduct of an employee and the conduct and motivation of an employer do not require a court to interpret any term of a collective bargaining agreement. *See id* at 407-08. Whether the Defendant has offered a legitimate, nonretaliatory reason for its decisions is a purely factual inquiry which does not turn on the meaning of any provision of a collective-bargaining agreement. *See id.* This Court has stated that with respect to 301 pre-emption, "...the mere fact that a broad contractual protection against discriminatory or retaliatory discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state-law violation dependent upon the terms of the private contract...In a typical case, a state tribunal could resolve either a discriminatory or retaliatory discharge claim without interpreting the "just cause" language of a collective bargaining agreement." *See Lingle*, 486 U.S. at 412-13.

This Court has recognized that "even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for 301 pre-emption purposes." *See Lingle*, 486 U.S. at 409-10. "It would be inconsistent with congressional intent under [301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *See Allis-Chalmers Corp.*, 471 U.S. at 212.

Recent Fifth Circuit cases illustrate the same principle. In *Trevino v. Levi Strauss & Co.*, 197 F.3d 777 (5th Cir. 1999), the plaintiffs alleged workers compensation retaliation under state law. Defendants asserted plaintiffs were terminated in accordance with policies outlined in the collective bargaining agreement. The Fifth Circuit held that the elements of retaliation are purely factual in nature, since the issues are focused on the employee's conduct and the employer's motivation. *See id* citing *Lingle*, 486 U.S. at 407. Retaliation claims are similar to discrimination claims, using the same burden shifting analysis established to evaluate Title VII claims. In either type of case, the factual inquiry focuses on motivation of the employer for its decisions, whether retaliatory or discriminatory. Moreover, this Court has specifically recognized that most discriminatory or retaliatory discharge claims can be determined without interpreting the "just cause" provisions of a collective bargaining agreement." *See Lingle*, 486 U.S. at 412-13.

The fact that the court would be required to refer to provisions of the collective bargaining agreement in the course of the proceedings does not automatically result in preemption. In *Lividas v. Bradshaw*, 512 U.S. 107 (1994) this Court observed that in both *Lueck* and *Lingle*,

> "we underscored the point that 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law, and we stressed that it is the legal character of a claim, as 'independent' of rights under the collective bargaining agreement, [*citation omitted*] (and not whether a grievance arising from 'precisely the same set of facts' could be pursued [*citation omitted*]) that decides whether a state cause of action may go forward. Finally, we were clear that when the meaning of

> contract terms is not the subject of dispute, the bare fact that a collective bargaining agreement will be consulted in the course of state law litigation plainly does not require the claim to be extinguished.(citation omitted)."

With respect the second issue presented for review by the Fifth Circuit, denial of a Motion for Leave to Amend a Complaint is reviewed for abuse of discretion. *Stripling v. Jordan Production Co., LLC*, 234 F.3d 863, 872 (5th Cir. 2000) citing *Whitmire v. Victus Ltd.*, 212 F.3d 885, 887 (5th Cir. 2000); *Martin's Herend Imports, Inc. v. Diamond Gem Trading U.S. Am. Co.*, 195 F.3d 765, 770 (5th Cir. 1999). In response to Defendants' Motion to Dismiss, Plaintiff filed a Motion for Leave to File Second Amended Complaint and a Response to the Motion. The District Court did not specifically rule on the Motion, consequently the Motion was overruled by operation of law.

Under the well plead complaint rule, a Plaintiff is the master of her complaint. *See Caterpillar*, 482 U.S. at 398-99. As master of her complaint, Plaintiff chose not to allege a §301 breach of contract claim, although the District Court stated it would have allowed her to amend her complaint if she had. Plaintiff's Second Amended Complaint did allege additional causes of action premised on the same facts and circumstances initially plead, and re-plead one of the claims that the District Court had dismissed without prejudice.

Before granting or denying leave to amend, courts should consider several factors including undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue or substantial prejudice to the opposing party, futility of amendment, whether the claims are frivolous, and the nature of the amendment. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962). In *Foman*, the court of appeals affirmed the

District Court's denial of a Motion to Vacate a Judgment in order to allow amendment of the complaint. This Court held that the court of appeals erred in affirming denial, since the record established that "the amendment would have done no more than state an alternative theory of recovery." *See id* at 182. The *Foman* opinion states that the mandate of FRCP 15(a) to freely allow amendments when justice so requires is to be heeded. If the underlying facts or circumstances may be a proper subject of relief, a plaintiff ought to be afforded an opportunity to test the claims on the merits. *See id.* In *Foman*, the amendment was sought after Judgment was entered, and at least under the facts of that case, this Court found abuse of discretion in denying leave to amend.

The Fifth Circuit has recognized that a District Court's discretion to deny leave to amend pleadings is limited by FRCP 15(a) which requires that leave to amend shall be freely given when justice so requires. *See Stripling v. Jordan Production Co., LLC*, 234 F.3d 863, 872 (5th Cir. 2000) citing *Foman;* and *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994). The Fifth Circuit has stated that "in the context of motions to amend pleadings, 'discretion' may be misleading, because Fed. R. Civ. P. 15(a) 'evinces a bias in favor of granting leave to amend.'" *See Stripling*, 234 F.3d at 872 citing *Martin's Herend Imports, Inc. v. Diamond & Gem Trading U.S. Am.Co.*, 195 F.3d 765, 770 (5th Cir. 1999). "Unless there is a 'substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial.'" *See id* citing *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981); and *Martin's Herend Imports, Inc.*, 195 F.3d at 770.

Dismissal for Want of Prosecution

The notice of dismissal for want of prosecution (App 1-2) sent to the District Court and copied to counsel of record states the

case was dismissed pursuant to 5th Cir. R. 42.3. However, neither the order denying Petitioner's motion to reinstate (App 3-4) the appeal nor the order denying Petitioner's motion for reconsideration of the order denying Petitioner's motion to reinstate the appeal (App 5-6) provide reasons or detail the basis for denial. The dismissal of Petitioner's appeal for want of prosecution effectively deprived Petitioner of a just determination of her case. If the District Court incorrectly determined that Petitioner's state law discrimination claims were pre-empted by §301 of the LMRA, then Petitioner should be afforded an opportunity to present her state law claims on the merits. The Clerk of the Court of Appeals failed to follow the Fifth Circuit's own rules which require notice and an opportunity to cure a default before a case is dismissed on the basis of failure to prosecute. Moreover, rule 42.3.1.1 specifically prohibits the dismissal of an appeal if the default is cured within 15 days of the notice provided under that rule. Even though Petitioner was never provided the notice required by rule 42.3.1.1, the default was timely cured when Petitioner's Brief and Record Excerpts was filed with the Court of Appeals on April 19, 2002, the week following receipt of notice during a telephone conversation that the case had already been dismissed for want of prosecution.

Petitioner acknowledges and recognizes that the Fifth Circuit Court of Appeals has authority to dismiss a case on the basis of failure to prosecute. "The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 629 (1962). The Court of Appeals did not dismiss this case on the basis of its inherent powers; the judgment issued as the mandate specifically cited 5th Cir. R. 42.3 as the basis of dismissal.

In *Link,* the District Court dismissed a case for want of

prosecution when counsel for Appellant failed to appear for a pre-trial conference despite receipt of notice to appear. The court found that counsel had failed to indicate ... a reasonable reason for his nonappearance and dismissed the case for failure to prosecute, and stated that the dismissal was based on the court's exercise of its inherent powers. *See id* 370 U.S. 626, 628-29. The Court of Appeals affirmed in a divided vote.

In considering the appropriateness of the dismissal, this Court found no abuse of discretion under the facts presented. This Court observed that whether an order dismissing a case for want of prosecution can stand on appeal is dependent on whether the action taken is within the permissible range of the court's discretion. *See id* at 633. This Court found that on the facts presented in that case, the District Court articulated the basis of its decision on the nonappearance of counsel at a scheduled pre-trial conference, and on the inference from the drawn-out history of litigation in the case, that the party had been deliberately proceeding in a dilatory fashion. *See id.*

In *Gonzalez v. Trininty Marine Group, Inc.*, 117 F.3d 894 (5th Cir, 1997), the Fifth Circuit Court of Appeals considered similar issues when the District Court dismissed Gonzalez' suit as a sanction for alleged discovery abuses pursuant to Fed. R. Civ. Proc. 37(b) and pursuant to its inherent powers under Article III. The Fifth Circuit observed that review of the District Court's order was for abuse of discretion, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35, reh'g denied 501 U.S. 1269 (1991).

The Fifth Circuit has observed that courts are vested with inherent power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" citing *Link v. Wabash R. Co.*, 370 U.S. 626, 630 ((1962), and that this inherent power includes the power of a court to control its docket by dismissing a case as a sanction for a party's failure to obey court

orders. *See Gonzalez*, 117 F.3d 894. The court further observed that when a court invokes its inherent powers, they must be exercised with "restraint and discretion," and that dismissing a case with prejudice is a harsh sanction. The court noted that involuntary dismissals will be upheld unless there is an abuse of discretion. The Fifth Circuit then noted that it had previously held dismissal of a case as a sanction should be confined to instances of "bad faith or willful abuse of the judicial process" citing *In Re United Markets Int'l, Inc.*, 24 F.3d 650, 654 (5th Cir.) *cert denied*, 513 U.S. 946 (1994); *Pressey v. Patterson*, 898 F.2d 1018, 1021 (5th Cir. 1990).

The *Gonzalez* opinion recognizes that dismissal with prejudice is an "extreme sanction that deprives a litigant of the opportunity to pursue his claim, and that a district court is required to impose the least severe sanction available," citing *Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513, 1519 (5th Cir. 1985); *Carroll v. Jaques Admiralty Law Firm*, 110 F.3d 290 (5th Cir. 1997). In ruling on the District Court's dismissal of the entire case as a sanction, the Fifth Circuit reversed and remanded the case to the District Court, recognizing that although a court may invoke its inherent powers, the Fifth Circuit requires the least onerous sanction which will address the offensive conduct. *See Gonzalez*, 117 F.3d 894.

Even though Petitioner's suit was dismissed under 5th Cir. R. 42.3 for want of prosecution, the effect of the dismissal amounts to the most extreme sanction and operates to deprive Petitioner of the opportunity to pursue her claim on the merits. Moreover, the Fifth Circuit has not articulated any basis or reasons for denying Petitioner's Motion to Reinstate Appeal, or in denying her Motion for Reconsideration. Respondents did not move for dismissal on the basis of failure to prosecute. The case was dismissed on the appellate court's own initiative. Moreover, there was no significant delay in the proceedings at

the appellate court, since the briefing schedule, although never received by counsel for Petitioner, set the deadline for filing the Brief and Record Excerpts for April 1, 2002; the case was dismissed for want of prosecution on April 11, 2002; counsel for Petitioner discovered the case had been dismissed on April 12, 2002, and filed a Motion to Reinstate on that same date. Petitioner's Brief and Record Excerpts was filed with the appellate court on April 19, 2002.

Under the facts of this case, dismissal of Petitioner's case for failure to prosecute violates the principles applicable to the exercise of a court's inherent powers and was directly contrary to the Fifth Circuit rule applicable to dismissal for want of prosecution when a party is represented by counsel. The appellate court did not exercise restraint and discretion, and did not impose the least onerous sanction to address the failure to timely file Petitioner's Brief and Record Excerpts. 5th Cir. R. 43.2.1.1 specifically provides in part "that if after notice, the default is cured within 15 days, **the clerk must not dismiss the appeal and may refer to the court the matter of disciplinary action against the attorney...**" (Emphasis added).

When a litigant's access to the courts is denied under the circumstances presented in the instant case, the fairness of our courts and our system of justice is seriously undermined. Petitioner deserves the opportunity to present her case on the merits for review and consideration. The Court of Appeals' dismissal of Petitioner's appeal for want of prosecution and in failing to follow 5th Cir. R. 42.3 constitutes a significant departure from the accepted and usual course of proceedings, and calls for the exercise of this Court's supervisory power.

CONCLUSION

The Fifth Circuit Court's failure to follow its own rules, and then in dismissing the appeal despite that the default was timely

cured constitutes a significant departure from the accepted and usual course of proceedings. Petitioner prays that this Court exercise its supervisory power over the Fifth Circuit Court of Appeals, and Order the Court of Appeals to reinstate Petitioner's appeal. Petitioner prays for such other and further relief to which she may be justly entitled, at law or in equity.

Respectfully submitted,

REGINA BACON CRISWELL
Counsel of Record
Carriage Place
P.O. Box 1399
Helotes, Texas 78023-1399
(210) 543-8940

RENÉ RODRIQUEZ
433 S. Tancahua
Corpus Christi, Texas 78401
(361) 882-1919

By: Regina Bacon Criswell
REGINA BACON CRISWELL
Texas State Bar No.: 01496580

ATTORNEYS FOR PETITIONER

Appendix

Notice of Dismissal for Want of Prosecution 1-2

Order Denying Motion to Reinstate Appeal. 3-4

Order Denying Motion for Reconsideration of Order Denying Motion to Reinstate Appeal 5-6

Order Denying Motion to Remand and Dismissing Certain Claims 7-18

Order Granting Motion to Dismiss 19-30

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 CAMP STREET
NEW ORLEANS, LA 70130

April 11, 2002

Mr. Michael N Milby, Clerk
Southern District of Texas, Corpus Christi
United States District Court
1133 N. Shoreline Boulevard
Corpus Christi, Texas 78401

No. 02-40126 Frost v. Harper
USDC No. C-01-CV-69

Enclosed is a certified copy of the judgment issued as the mandate. Record/original papers/exhibits to be returned.

Sincerely,
CHARLES R. FULBRUGE, III, Clerk

By: _____
Jodi Rodrigue, Deputy Clerk

/jt
cc: w/encl:
Ms. Regina Bacon Criswell
Mr. Rene Daniel Rodriguez
Mr. Stanley Weiner

P.S. to Ms. Criswell: Please return the 3 volume record on appeal to this office as soon as possible.
MDT-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40126

ANGIE FROST
Plaintiff-Appellant

v.

JOHN HARPER;
MICHAEL "MIKE" SIDES;
ROBERT JOSEPH KOSTELINK;
CITGO REFINING AND CHEMICALS COMPANY LP
Defendants-Appellees

U.S. COURT OF APPEALS
FILED
APR 11 2002
CHARLES R. FULBRUGE III
CLERK

Appeal from the United States District Court for the
Southern District of Texas, Corpus Christi

CLERK'S OFFICE:

Under 5th Cir. R. 42.3, the appeal is dismissed as of April 11, 2002 for want of prosecution. The appellant failed to timely file brief and record excerpts.

CHARLES R. FULBRUGE III
Clerk of the United States Court
of Appeals for the Fifth Circuit

By: /S/_____
Jodi Rodrigue, Deputy Clerk
FOR THE COURT-BY DIRECTION

DIS-S

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 CAMP STREET
NEW ORLEANS, LA 70130

May 7, 2002

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 02-40126 Frost v. Harper
USDC No. C-01-CV-69

Enclosed is an order entered in this case.

Sincerely,
CHARLES R. FULBRUGE, III, Clerk

By: /S/_____
Peter Conners, Deputy Clerk
504-310-7685

/pac
Ms. Regina Bacon Criswell
Mr. Stanley Weiner

P.S. to Ms. Criswell: In light of the attached order, it is necessary for you to advise this office, within 15 days, what means, if any you will take to have the unfiled brief and record excerpts returned to you. If no response is received within 15 days, the briefs and record excerpts will be recycled.

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40126

ANGIE FROST
Plaintiff-Appellant

v.

JOHN HARPER;
MICHAEL "MIKE" SIDES;
ROBERT JOSEPH KOSTELINK;
CITGO REFINING AND CHEMICALS COMPANY LP
Defendants-Appellees

U.S. COURT OF APPEALS
FILED
MAY 7 2002
CHARLES R. FULBRUGE III
CLERK

Appeal from the United States District Court for the
Southern District of Texas, Corpus Christi

ORDER:

IT IS ORDERED that appellant's motion to reinstate the appeal is DENIED.

/S/
JACQUES L.WIENER, JR.
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 CAMP STREET
NEW ORLEANS, LA 70130

June 18, 2002

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 02-40126 Frost v. Harper
USDC No. C-01-CV-69

Enclosed is an order entered in this case.

Sincerely,
CHARLES R. FULBRUGE, III, Clerk

By: /S/_____
Mary Ann Lopiparo, Deputy Clerk
504-310-7684

Ms. Regina Bacon Criswell
Mr. Stanley Weiner

P.S. to Ms. Criswell: In light of the attached order, it is necessary for you to advise this office, within 15 days, what means, if any you will take to have the unfiled brief and record excerpts returned to you. If no response is received within 15 days, the briefs and record excerpts will be recycled.

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40126

ANGIE FROST
Plaintiff-Appellant

v.

JOHN HARPER;
MICHAEL "MIKE" SIDES;
ROBERT JOSEPH KOSTELINK;
CITGO REFINING AND CHEMICALS COMPANY LP
Defendants-Appellees

U.S. COURT OF APPEALS
FILED
JUN 18 2002
CHARLES R. FULBRUGE III
CLERK

Appeal from the United States District Court for the
Southern District of Texas, Corpus Christi

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges

BY THE COURT:

IT IS ORDERED that Appellant's motion for Leave to file out of time the motion for reconsideration is GRANTED.

A member of this panel previously denied Appellant's motion to reinstate the appeal. The panel has considered Appellant's motion for reconsideration. IT IS FURTHER ORDERED that the motion is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ANGIE FROST,	§	United States District Court
	§	Southern District of Texas
Plaintiff,	§	Entered
	§	MAR 23 2001
v.	§	Michael N. Milby, Clerk of Court
	§	
JOHN HARPER, MICHAÉL "MIKE" SIDES, ROBERT JOSEPH KOSTELNIK, AND CITGO REFINING AND CHEMICAL COMPANY, LP	§	CIVIL ACTION NO. C-01-069
	§	
Defendants.	§	

ORDER DENYING MOTION TO REMAND AND DISMISSING CERTAIN CLAIMS

Pending before the Court is Plaintiff's Motion to Remand. For the reasons set forth below, the Court will deny the motion. Additionally, the Court will dismiss certain of Plaintiff's causes of action for failure to state a claim upon which relief may be granted.

I. JURISDICTION

Pursuant to 28 U.S.C. §1331, this Court has federal question jurisdiction over this action because Plaintiff's causes of action are preempted by §301 of the Labor Management Relations Act, 29 U.S.C. §1985(a).

II. FACTS

This is an employment dispute. In her First Amended Petition, Plaintiff alleges that she was employed by CITGO Refining and Chemicals Company (the "Company") for approximately 17 years with no record of disciplinary action. In 1999, however, Plaintiff was suspended without pay pending an investigation by the Company to determine whether Plaintiff had "abused" two days of sick leave. On January 12, 2002, the Company terminated Plaintiff, asserting as grounds that she had not cooperated with the investigation. Plaintiff appealed the termination through a grievance process, and the mater eventually was submitted to arbitration pursuant to the Collective Bargaining Agreement (CBA) that the Company executed. In November 2000, the arbitrator rendered his opinion upholding Plaintiff's termination.

Plaintiff sues the company, Michael Sides, John Harper, and Robert Joseph Kostelink. All three individuals, agents of the company, appear to have been supervisors or managers. Plaintiff alleges that the arbitrator rendered his decision "in whole in substantial part on the written statements and testimony of Defendants Hong Harper and Michael 'Mike' Sides." Plaintiff alleges that Mr. Sides and Mr. Harper "carried out a scheme to doctor testimony and suborn perjury."

Plaintiff asserts the following causes of action: against all Defendants, civil conspiracy to terminate her because of her vocal advocacy against sexual harassment and her active union activity; against the three individuals, fraud, in that Defendants Sides and Harper lied "for the purpose of inducing Defendant CITGO to terminate Plaintiff;" against the three individuals, intentional infliction of emotional distress; against the Company, breach of the Collective Bargaining Agreement; against Defendants Sides and Harper, malicious

prosecution; against all Defendants, abuse of process; against the three individuals, tortuous interference with a contractual relationship; against all Defendants, violations of the Texas Labor Code, in that they discriminated against her based on age, race, and sex. Plaintiff seeks actual and exemplary damages.

The Defendants removed the action, arguing that Plaintiff's claims are preempted by federal law. Plaintiff has moved for remand.

III. DISCUSSION

Sua sponte motion for dismissal

The Court may dismiss a claim on its own initiative for failure to state a claim where the inadequacy of the claim is apparent as a matter of law. Guthrie v. Tifco Indus., 941 F.2d 374, 379 (5th Cir. 1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1267 (1992); Shawnee Int'l N.V. v. Hondo Drilling Co., 742 F.2d 234, 236 (5th Cir. 1984). The Court finds that several of Plaintiff's claims are inadequate as a matter of law.

Civil Conspiracy

There are two essential elements to establish an actionable civil claim for civil conspiracy under Texas law: (1) there must be an unlawful purpose by two or more persons; and (2) there must be at least one unlawful or overt act. McLean v. International Harvester Co., 817 F.2d 1214, 1220 (5th Cir. 1987) (citing Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983)). To establish a civil conspiracy, a plaintiff must be able to show, inter alia, a meeting of the minds of two or more person on the object or course of action. Id. at 934. The unlawful acts asserted by Plaintiff are the material misrepresentations by Messrs. Sides and Harper to the

arbitrator during her appeal of her termination; Plaintiff claims that these individuals, as well as Mr. Kostelnik and the Company, conspired to obtain her dismissal. However, the acts of a corporate agent are the acts of the corporation, and a corporation cannot conspire with itself. Elliott v. Tilton, 89 F.3d 260, 264-265 (5th Cir. 1996) (citing Fojtik v. First National Bank, 752 S.W.2d 669, 673 (Tex.App. --Corpus Christi 1988, writ denied)). "As a matter of law, a corporation or other company cannot conspire with itself, no matter how many of its agents participate in the complained of action." Id. (citing Wilhite v. H.E. Butt Co., 812 S.W.2d 1, 5 (Tex.App.--Corpus Christi 1991, no writ)).

The only people alleged by Plaintiff to have participated in the conspiracy were Messrs. Harper, Sides, and Kostelnik and the Company. Thus, all alleged co-conspirators either were the Company or were agents of the Company. Accordingly, Plaintiff has failed to state a claim of civil conspiracy, because there essentially is only one actor. See Elliott v.Tilton, *supra*.

Fraud

In Texas, the "elements of actionable fraud are: (1) Misrepresentation of a material fact; (2) with intention to induce action or inaction; (3) reliance by the Plaintiff; and (4) damage." Hennigan v. Harris County, 593 S.W.2d 380, 383 (Tex.Civ.App.--Waco 1979, no writ) (emphasis supplied). In essence, Plaintiff has alleged that Harper and Sides misrepresented material information to the arbitrator and that the misrepresentations led the arbitrator to uphold her termination. Plaintiff has not alleged and admittedly cannot allege that she relied on any misrepresentation by the Defendants. Accordingly, Plaintiff has failed to state a claim for fraud.

Malicious Prosecution

There are six elements to establish the tort of malicious prosecution of a civil claim: (1) the institution or continuation of civil proceedings against the plaintiff; (2) by or at the insistence of the defendant; (3) malice in the commencement of the proceeding; (4) lack of probable cause for the proceeding; (5) termination of the proceeding in plaintiff's favor; and (6) special damages. Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 207 (Tex. 1996). Without even considering whether a claim for malicious prosecution lies for institution of termination proceedings under an employment contract, the proceeding did not terminate in Plaintiff's favor. Plaintiff alleges that this does not matter, because a finding in her favor would have been "an impossibility. . . because of the false testimony and evidence presented. . ." but Plaintiff cites no authority that would allow a plaintiff to maintain a malicious prosecution claim on that ground. Because Plaintiff has not alleged, and admittedly cannot allege, that the proceeding terminated in her favor, her claim must fail as a matter of law.

Tortious Interference with Contractual Relationship

A cause of action for tortious interference with a contract is established upon a showing that (1) a contract existed between the plaintiff and a third party that was the subject of interference; (2) the defendant's act of interference was willful and intentional; (3) the intentional act of the defendant was a proximate cause of damage to the plaintiff; and (4) actual damage and loss to the plaintiff resulted. Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 939 (Tex. 1991). Plaintiff's claim for tortious interference fails because she is alleging that Harper, Sides, and Kostelnik tortiously interfered with her contract with CITGO. The problem with this claim is that all three of these individuals were acting as agents for CITGO; in essence, she is claiming that CITGO tortiously interfered with

its own contract.

As a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts. Holloway v. Skinner, 898 S.W.2d 793, 795 (Tex. 1995). In Holloway, the Texas Supreme Court noted, "To establish a prima facie case under such circumstances, the alleged act of interference must be performed in furtherance of the defendant's personal interests so as to preserve the logically necessary rule that a party cannot tortiously interfere with its own contract. We hold that to meet this burden in a case of this nature, the plaintiff must show that the defendant acted in a fashion so contrary to the corporation's best interests that his actions could only have been motivated by personal interests." Id., 898 S.W.2d at 796.

Plaintiff's complaint fails to allege that Harper, Sides, and Kostelnik acted in any capacity other than their capacity as agents of the Company. Plaintiff has not alleged that these individuals were motivated by any cognizable personal interest. Accordingly, the Court finds that Plaintiff has failed to state a claim for tortious interference with a contract.

Preempted Claims

Under the Labor Management Relations Act ("LMRA") , "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement" the state-law claim is preempted. Lingle v. Norge Division of Magic Chef. Inc., 486 U.S. 399, 405-06, 108 S. Ct. 1877, 1881-84 (1988); Allis-Chalmers corp. v. Lueck, 471 U.S. at 208-10, 105 S. Ct. at 1909-11 (1985). See also, Avco Corp. v. Aero Lodge No. 735 Int'l Assoc. of Machinists and Aerospace Workers, 390 U.S. 557, 88 S. Ct. 1235 (1968). "The critical inquiry concerns the necessity of looking to the terms of a collective- bargaining agreement to resolve a state law claim. Section 301 governs claims founded

directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement." Baker v. Farmers Elec. Co-op, Inc., 34 F.3d 274, 280 (5th Cir. 1994) (internal quotations omitted) (quoting Caterpillar. Inc. v. Williams, 482 U.S. 386, 391-392, 107 S. Ct. 2425, 2430 (1987)). If the alleged conduct arises out of activities discussed in the collective bargaining agreement, courts generally hold that the claim is preempted; if the agreement would not condone the activity, there is no preemption. Id. at 280-81. See e.g., Perugini v. Safeway Stores. Inc., 935 F.2d 1083 (9th Cir. 1991) (reversing finding of preemption of emotional distress claim); Brown v. Southwestern Bell Tel. Co., 901 F.2d 1250 (5th Cir. 1990) (upholding a finding of preemption of an emotional distress claim); Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985) (affirming the preemption of state tort claim arising out of the suspension and drug testing of employees).

If the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement (CBA), the application of state law is preempted. Trevino v. Ramos, 197 F.3d 777, 779 (5th Cir. 1999). Even if a claim implicates a CBA, however, preemption is not required if it only tangentially involves provisions of the agreement. Id., 197 F.3d at 780. "[T]he bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." Id., (*quoting* Livadas v. Bradshaw, 512 U.S. 107, 123, 114 S. Ct. 2068 (1994). Moreover, a plaintiff's state law claims will not be preempted even though "intertwined" with a CBA, so long as they are not "inextricably intertwined" with it. Id., (quoting Jones v. Roadway Express, Inc., 931 F.2d 1086, 1089 (5th Cir. 1991).

Case law demonstrates that whether a claim requires interpretation of a CBA requires the Court to look at each of the legal elements of the claim and determine whether that

element can be addressed only by interpreting some provision of the CBA. See, e.g., Reece v. Houston Lighting & Power Co., 79 F.3d 485, 487 (5th Cir. 1996) (analyzing Texas Labor Code claims); Trevino v. Ramos, 197 F.3d at 779-780 (same).

With these principles in mind, the Court will turn to each of Plaintiff's remaining claims.

Intentional Infliction of Emotional Distress

To prevail in a suit for intentional infliction of emotional distress in Texas, a plaintiff must show: (1) intentional or reckless conduct; (2) that is extreme or outrageous; (3) that caused emotional distress; and (4) that was severe in nature. Burden v. General Dynamics Corp., 60 F.3d 213, 218 (5th Cir. 1995). The Fifth Circuit appears to have adopted a rule in which any emotional distress claim in the employment context is preempted if there is a CBA. *See* Stafford v. True Temper Sports, 123 F.3d 291, 296 (5th Cir. 1997) (because allegedly outrageous actions were taken in context of employment dispute, they were preempted by LMRA); *see also* Burgos v. Southwestern Bell Telephone Co., 20 F.3d 633 (5th Cir. 1994). The court pointed out, "in situations such as this, it is appropriate for a court to look at the collective bargaining agreement to see if an employer's actions are reasonable." In Burgos, *supra*, the Fifth Circuit cited with approval a Fourth Circuit case finding that an intentional infliction of emotional distress claim was preempted, where part of the outrageous conduct alleged was treatment of the plaintiff's personal property. McCormickv. AT& T Technologies, Inc., 934 F.2d 531 (4th Cir.1991) (en banc), *cert. denied*, 502 U.S. 1048, 112 S.Ct. 912 (1992). The Fourth Circuit held that the circumstances that must be considered in examining management's conduct are not merely factual, but contractual, and the collective bargaining agreement is a crucial component of these circumstances. Id., 934 F.2d at

535-536. The Fifth Circuit agreed with this holding. Burgos, 20 F.3d at 636.

In the instant case, Plaintiff complains not merely that the individual defendants' false statements were extreme and outrageous, but that they were outrageous "because these Defendants knew that false and perjured statements would not only substantiate Plaintiff's termination but also prevent any reasonable expectation of reinstatement through the grievance process." Plaintiff's First Amended Petition at 5. To prove this allegation, Plaintiff will have to show that the Defendants' conduct caused her termination and prevented her reinstatement, which would require the Court to delve into the propriety of the termination under the CBA. The claim is preempted under the reasoning of the Burgos case, *supra*.

The fact that the claim is asserted against individual defendants does not help Plaintiff. In Baker v. Farmers Elec. Co-op., Inc., 34 F.3d 274, 283-284 (5th Cir. 1994), the Fifth Circuit noted that, where a claim in inextricably intertwined with a collective bargaining agreement, the status of some of the defendants as individuals does not defeat preemption.

Breach of Contract

Plaintiff's breach of contract claim is indisputably preempted. Plaintiff alleges that CITGQ entered into a Collective Bargaining Agreement, but that CITGO breached that agreement by failing to provide her a fair and impartial arbitration agreement. This claim is directly related to the CBA and is, therefore, preempted.

Abuse of Process

In order for a person to recover for abuse of process, he

must plead and prove three essential elements: 1) that the defendant made an illegal, improper, or perverted use of the process, a use neither warranted nor authorized by the process; 2) that the defendant had an ulterior motive or purpose in exercising such illegal, perverted or improper use of the process; and 3) that damage resulted to the plaintiff as a result of such irregular act. Martin v. Trevino, 578 S.W.2d 763, 769 (Tex.Civ.App. - Corpus Christi 1979, writ ref'd, n.r.e.). "In a narrow sense process refers to individual writs issued by the court during or after litigation. Process has been broadly interpreted to encompass the entire range of procedures incident to litigation. Black's Law Dictionary, 1370 (4th Ed. 1951). The gravamen of an action for abuse of process is the misuse of process, whether properly or improperly obtained, for any purpose other than that which it was designed to accomplish." Id. Plaintiff's claim for abuse of process stands on shaky ground, because she does not complain about "process" in either the narrow or broad sense described in Martin v. Trevino. She is complaining about a private proceeding instituted by her employer pursuant to a private contract. There was no litigation involved, and no court issued any writ. Even if abuse of arbitration proceedings could fall within the ambit of a claim for "abuse of process," however, this claim is preempted, because such claims "implicate both procedural and substantive aspects of the CBA grievance provisions, and thus also fall within Section 301 preemption under the LMRA." Johnson v. Health Management Systems of America, 96 F.Supp.2d 711(E.D.Mich. 2000) (finding claim of "abuse of process" preempted where the plaintiff complained about the manner in which the employer carried out the grievance procedure defined by a CBA).

Discrimination under Texas Labor Code

In Reece v. Houston Lighting & Power Co., 79 F.3d 485,

487 (5th Cir. 1996), the Fifth Circuit examined an employee's claim of discrimination under the Texas Labor Code. The Fifth Circuit noted, "Reece's discrimination claim turns on questions of promotion, seniority, and assignment to training programs, all of which are provided for in the CBA. HL & P will undoubtedly rely on the CBA as its legitimate, non- discriminatory reason for Reece's treatment. When Reece then attempts to show that HL & P's stated reason is pretextual, the CBA would have to be interpreted because Reece would have to challenge HL & P's rights under the CBA. Thus, the interpretation of the CBA is made necessary by an employer defense." (Citations and internal quotation marks omitted). In the instant case, Plaintiff asserts that "adverse employment actions" (presumably, her termination) were taken against her because of her race, age, and sex. When she attempts to demonstrate this, CITGO will point to the CBA, which includes provisions regarding abuse of sick leave and reserving to the company the right to discipline employees, as part of its non-pretextual reason for dismissal. This will require the Court to look into the CBA to determine whether the claim of abuse of sick leave was pretextual. Plaintiff's discrimination claim, therefore, is preempted.

Removal of Preempted Claims

Under the well-pleaded complaint rule, federal preemption is generally a defensive issue that does not authorize removal of a case to federal court. However, in Avco Corp. v. Aero Lodge No. 735. Int'l Assn. of Machinists, 390 U.S. 557, 88 S.Ct. 1235, 1237, (1968), the Supreme Court held that because state actions for breach of collective bargaining agreements were preempted by section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185, the federal court had removal jurisdiction. In Franchise Tax Board v. Construction Laborers Vacation

Trust, 463 U.S. 1, 103 S.Ct. 2841, 2853-54 (1983), the Court explained that because "the preemptive force of § 301 is so powerful as to displace entirely" state actions for breach of a collective bargaining agreement, any such action "is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." The Court further stated: "Avco stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." 103 S.Ct. at 2854. Even though Defendants have raised preemption as a defensive issue, the case is removable if any of Plaintiff's claims are preempted as a matter of law. *See* Willy v. Coastal Corp., 855 F.2d 1160,1165 (5th Cir. 1988). The fact that Plaintiff's remaining claims are preempted by §301 of the LMRA provides the necessary federal question jurisdiction for removal of this case. Accordingly, Plaintiff's motion for remand must be denied.

IV. CONCLUSIONS

Plaintiff's claims for civil conspiracy, fraud, malicious prosecution, and tortious interference with a contractual relationship are DISMISSED, without prejudice, for failure to state a claim upon which relief may be granted. Plaintiff's claims for intentional infliction of emotional distress, breach of contract, abuse of process, and discrimination under the Texas Labor Code are preempted by the Labor Management Relations Act, and the Court has jurisdiction over those claims. Plaintiff's motion for remand is DENIED.

Signed this ____ day of March, 2001.

/S/_____
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ANGIE FROST,	§	United States District Court
	§	Southern District of Texas
Plaintiff,	§	Entered
	§	MAR 23 2001
v.	§	Michael N. Milby, Clerk of Court
	§	
JOHN HARPER, MICHAEL	§	CIVILACTION NO. C-01-069
"MIKE" SIDES, ROBERT	§	
JOSEPH KOSTELNIK, AND	§	
CITGO REFINING AND	§	
CHEMICAL COMPANY, LP	§	
	§	
Defendants.	§	

ORDER GRANTING MOTION TO DISMISS

On this day came on to be considered Defendants' John Harper, Michael "Mike Sides, Robert Joseph Kostelnk and Citgo Refining and Chemicals Company, LP (collectively, "Defendants") Motion to Dismiss. For the reasons set forth below, the Court will GRANT the motion.

I. JURISDICTION

Plaintiff's causes of action are preempted by §301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 1985 (a). Therefore, this Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331.

II. FACTS

This is an employment dispute. In her First Amended Petition, Plaintiff alleges that she was employed by CITGO

Refining and Chemicals Company (the "Company") for approximately 17 years with no record of disciplinary action. In 1999, however, Plaintiff was suspended without pay pending an investigation by the Company to determine whether Plaintiff had "abused" two days of sick leave. On January 12, 2002, the Company terminated Plaintiff, asserting as grounds that she refused to cooperate with the investigation. Plaintiff appealed the termination through a grievance process, and the mater eventually was submitted to arbitration pursuant to the Collective Bargaining Agreement ("CBA" that the Company executed. An arbitration hearing was held on August 17-18, 2000 and on November 27, 2000 the arbitrator denied Plaintiff's grievance.

Plaintiff alleges that the arbitrator rendered his decision "in whole or in substantial part on the written statements and testimony of Defendants John Harper and Michael "Mike" Sides." Plaintiff alleges that Mr. Sides and Mr. Harper "carried out a scheme to doctor testimony and suborn perjury."

Plaintiff asserted the following causes of action: against all Defendants, civil conspiracy to terminate her because of her vocal advocacy against sexual harassment and her active union activity; against the three individuals, fraud, in that Defendants Sides and Harper lied "for the purpose of inducing Defendant CITGO to terminate Plaintiff;" against the three individuals, intentional infliction of emotional distress; against the Company, breach of the Collective Bargaining Agreement; against Defendants Sides and Harper, malicious prosecution; against all Defendants, abuse of process; against the three individuals, tortuous interference with a contractual relationship; against all Defendants, violations of the Texas Labor Code, in that they discriminated against her based on age, race, and sex.

Plaintiff seeks actual and exemplary damages.

The Defendants removed this action, arguing that Plaintiff's claims are preempted by federal law pursuant to §301 of the LMRA and §8 of the NLRA. Plaintiff moved for remand to state court asserting that her claims are not preempted. This Court denied Plaintiff's motion for remand and sua sponte dismissed Plaintiff's claims of fraud, civil conspiracy, malicious prosecution and tortuous interference. The Court also ruled that Plaintiff's claims for intentional infliction of emotional distress, breach of contract, abuse of process and discrimination were preempted by §301 of the LMRA. Defendant has filed a Motion to Dismiss as well as a Motion for Summary Judgment and a Response to Defendant's Motion to Dismiss.

III. DISCUSSION

A. STANDARD OF REVIEW

Rule 12 (b) (6) of the Federal Rules of Civil Procedure authorizes the court to dismiss claims on the basis of dispositive law. Neitzke v. Williams, 490 U.S. 319, 326 109 S.Ct. 1827, 1832 (1989). The motion dismiss for failure to state a claim is viewed with disfavor and rarely granted. Kaiser Aluminum & Chem. Sales, Inc., 677 F.2d at 1050. When ruling on a 12 (b) (6) motion to dismiss, the Court must accept the plaintiff's factual allegations as true, and view these allegations in a light most favorable to the plaintiff. Capital Parks, Inc. v. Southeastern Advertising & Sales Sys., 30 F.3d 627, 629 (5th Cir. 1994); Cinel v. Connick, 15 F.3d 1338, 1341 (5th Cir.1994); O'Quinn v. Manuel, 773 F.2d 605, 60-8 (5th Cir. 1985). In a 12 (b) (6) motion, the Court should not look beyond the pleadings. McCartney v. First City Bank, 970 F.2d 45, 47 (5th Cir. 1992).

A 12 (b) (6) motion should not be granted "unless it

appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which entitle him to relief." Conley v. Gibson, 335 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957); Mitchell v. McBryde, 944 F.2d 229, 230 (5th Cir. 19910. The question before the Court in examining a 12 (b) (6) motion is whether the plaintiff's complaint states any valid claim for relief. Conley v. Gibson, 335 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957); Lowrey v. Texas A&M Univ. System, 117 F.3d 242 (5th Cir. 1997); Mitchell v. McBryde, 944 F.2d 229, 230 (5th Cir. 1991).

Since federal courts simply require "notice pleadings," the Court construes Plaintiff's pleading liberally, and lack of detail does not constitute a sufficient ground to dismiss a complaint under Rule 12 (b) (6). Strauss v. City of Chicago, 760 F.2d 765, 767 (7th Cir. 1985); Letisha A. By Murphy v. Morgan, 855 F. Supp. 943, 947 (M.D. Ill. 1994); Harris v. O'Grady, 803 F. Supp. 1361, 1364 (N.D. Ill. 1992).

B. SECTION 301 OF THE LMRA

1. General Principles

Section 301 of the LMRA provides jurisdiction and remedies for an individual employee to enforce rights and challenge violations of a labor contract between the employer and the union. Landry v. Cooper/T. Smith Stevedoring Co., 880 F.2d 846, 850 (5th Cir. 1989). Section 301 entirely displaces state law causes of action for violation of a collective bargaining agreement. Medrano v. Excel Corp., 985 F.2d 230, 232 (5th Cir. 1993) (citing United Steelworkers v. Rawson, 495 U.S. 362, 368 110 S.Ct. 1904, 1909, 109 L.Ed.2d 362 (1990). Additionally, when a state tort claim cannot be resolved without interpreting a provision of a collective bargaining agreement, the application of state law is preempted and federal law is applied. Lingle v. Norge Div. Of Magic Chef, Inc., 486 U.S. 399, 405-06, 108 S.Ct. 1877,

1881, 100 L.Ed.2d 410 (1988).

After sua sponte dismissal of several of Plaintiff's claims, the Court determined that Plaintiff's remaining claims for intentional infliction of emotional distress, breach of contract, abuse of process, and discrimination were completely preempted by §301. (See Order Denying Motion to Remand and Dismissing Certain Claims Dated March 21, 2001.) The Court concluded that the resolution of each of these claims would require the Court to interpret the Collective Bargaining Agreement. See id.

The inquiry into Plaintiff's claims against Defendant does not end with the determination that the claims are completely preempted by §301 of the LMRA. When Section 301 completely displaces a state-law claim, that claim can then be brought as a breach of labor contract under §301. Thomas v. LTV Corp., 39 F.3d 611, 621-622 (5th Cir. 1994). In Allis-Chalmers Corp. v. Lueck, the Supreme Court held that "when resolution of a state-law claim is substantially dependent upon an analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a §301 claim or dismissed as preempted by federal labor-contract law." 471 U.S. 202, 220 (1985).

To state a claim under §301, Plaintiff must demonstrate both that she has exhausted all contractual remedies provided for under the terms of the CBA and that the union breached its duty of fair representation in the grievance and arbitration proceedings. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164-165 (1983). Suits under §301 normally comprise two causes of action; first, where the employees alleges the employer breached the collective-bargaining agreement and second, where the employee claims that the union breached its duty of fair representation. Reed v. United Transp. Union, 488 U.S. 319,

328, 109 S.Ct. 621, 627, 102 L.Ed.2d 665 (1989). The employee may choose to sue either defendant or both, but the case to be proven contains the same two elements. DelCostello, 462 U.S. at 165, 103 S.Ct. at 2291.

2. Exhaustion of Remedies Under the Collective Bargaining Agreement

Plaintiff must first demonstrate that she has exhausted all contractual remedies under the CBA. Plaintiff in this case appealed her termination through the grievance process provided for under the terms of the CBA. Eventually, the matter was submitted to arbitration on November 27, 2000 the arbitrator rendered an opinion upholding Plaintiff's termination. "The employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement." Vaca v. Spies, 386 U.S. 171, 184, 87 S.Ct., 903, 914 (1967). The CBA in the instant action provides for a procedure for employees to present grievances to the company, a procedure to follow if the grievance remains unresolved and finally a provision for arbitration. (See Defendant's Notice of Removal Exhibit C at 25-27). Additionally, the CBA sets forth the grievance procedure and arbitration procedure as the exclusive and final remedy for claims. (See Id. at 27). Defendants do not assert in their motion to dismiss that Plaintiff has not exhausted all of her administrative remedies under the CBA. Under the standard of review for a motion to dismiss, the court must view the factual allegations in a light most favorable to the Plaintiff. Capital Parks, 30 F.3d at 629. Plaintiff has followed the CBS procedure by filing a grievance with the Defendant and appealing that decision to arbitration. Thus, the Court concludes that Plaintiff has exhausted all of her administrative remedies under the CBA.

3. Union Breach of Fair Representation

A fair representation claim against the union is an "indispensable predicate" for an employee to bring a §301 claim against the employer. Daigle v. Gulf States Utilities Co., Local Union No. 2286, 794 F.2d 974, 979 (5th Cir. 1986) (quoting United States Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981)). Defendant asserts that Plaintiff cannot allege nor prove a breach of her union's duty of fair representation.

Plaintiff has made no allegation in her complaint of any subsequent pleading that the Union failed to meet its duty of fair representation. Plaintiff's Response mentions §301 only once and does not attempt to make any claim of a breach of duty by her union. Plaintiff's response does not respond to any allegations made in Defendant's Motion to Dismiss. Plaintiff's Response merely suggest that Plaintiff should be allowed to refile claims that were previously dismissed in this action. (Plaintiff's Response to Defendant's Motion to Dismiss at 1).

Plaintiff has filed a Motion for Leave to File Second Amended Complaint which again makes no mention of her claim under §301. Plaintiff merely wishes to replead a claim for tortuous interference with contract and to add a claim for declaratory judgment and to vacate the arbitration award. (See Plaintiff's Motion for Leave to File Second Amended Complaint at 6-7). The deadline for amending pleadings in this case passed on May 21, 2001. Plaintiff cannot now allege a claim against the Union nor can she replead her claim against the Defendant to assert the Union's breach of duty of fair representation.

Additionally, Plaintiff has brought suit against her union regarding the paying of her attorney's fees for the

arbitration. (See Defendant's Motion to Dismiss Exhibit A). In the Motion to Remand for that case, Plaintiff states "there are no allegations that Defendant (Union) did not fairly represent Plaintiff while administering the collective bargaining agreement. (See id. at 2).

Though §301 does not require it, Plaintiff could have brought suit against the union for breach of its duty of fair representation. However, Plaintiff is now time-barred from brining a suit against the union. Where the grievance and arbitration procedure is the exclusive and final remedy for claims, suits brought under §301 are subject to a six-month statue of limitation. DelCostello, 462 U.S. at 172, 103 U.S. S.Ct. at 2294 (quoted in Daigle, 794 F.2d at 978). In Thomas, while holding that petitioner's claims were time-barred, the Fifth Circuit Court of Appeals began the running period for the statue of limitations at the termination of the grievance period. 39 F.3d at 622. Here, the arbitration process was completed on November 27, 2000. Following the DelCostello rule, the statute of limitations ended on May 27, 2001. Thus, Plaintiff's claim against the union is bared by the six-month statute of limitation.

In accordance with the above discussion, this Court finds that Plaintiff is unable to state a claim under §301 and thus her claims for intentional infliction of emotional distress, breach of contract, abuse of process and discrimination should be dismissed.

C. SECTION 8 OF THE NATIONAL LABOR RELATIONS ACT (THE "NLRA")

In the alternative, Defendant asserts that this Court lacks subject matter jurisdiction over Plaintiff's state law claims of abuse of process, intentional infliction of emotional distress and breach of contract because they are preempted

by §8 of the NLRA. Federal courts do not generally have jurisdiction over activity which is arguably subject to §7 or §8 of the NLRA and must defer to the National Labor Relations Board on these issues. U.A. 198 Health & Welfare, Education and Pension Funds v. Rester Refrigeration Service, Inc., 790 F.2d 423, 425 (5th Cir. 1986), cert. denied, 485 U.S. 904, 108 S.Ct. 1074, 99 Led.2d 233 (1988). The rationale behind this rule is to avert interference with national labor policies. McDonald v. Oliver, 525 F.2d 1217, 1230 (5th Cir. 1976).

Section 8 of the NLRA prohibits employers from engaging in unfair labor practices. "It shall be an unfair labor practice3 for an employer...by discrimination in regard to hire or tenure of employment or any term condition of employment to encourage or discourage membership in any labor organization." National Labor Relations Act, 29 U.S.C.A. §158(a)(3). An employer violates §8(a)(3) by discharging employees because of their union activity. See NLRB v. Thermon Heat Tracing Services Inc., 143 F.3d 181, 186 (5th Cir. 1998). Plaintiff's claims for breach of contract, intentional infliction of emotional distress and abuse of process arise from Plaintiff's allegedly wrongful termination and Plaintiff asserts that she was terminated due to her "active union activity." (See Plaintiff's First Amended Petition at 3, 4, and 5). Plaintiff's claims are arguably subject to the NLRA.

When the factual basis of a state-law claim is arguably subject to the NLRA, such a claim can only be advanced if Plaintiff can demonstrate that 1) the conduct is only of peripheral concern to the Act, or 2) regulation of the conduct is so deeply rooted in local law that preemption is inappropriate. Belknap v. Hale, 463 U.S. 491, 509 (1983). Where there is an "identical controversy" between what would be at issue in an unfair labor practice charge and in

the corresponding state-law claim, such a state law claim cannot be side to be of peripheral concern and thus cannot proceed in state or federal court. Id.

Plaintiff bases her claims for breach of contract, abuse of process and intentional infliction of emotional distress on the allegation that Defendant breached the CBA by wrongfully terminating her employment due to her union activity and that Defendant abused the grievance and arbitration proceedings to support the termination. The resolution of all three of these claims requires an examination of Defendant CITGO's motives for both the termination and its alleged misuse of the grievance and arbitration proceedings, the identical evaluation required to determine whether Defendant committed an unfair labor practice in violation of the NLRA.

Plaintiff's claim for intentional infliction of emotional distress alleges that Defendant's conduct was extreme and outrageous "because these Defendant's knew that false and perjured statements would not only substantiate Plaintiff's termination but also prevent any reasonable expectation of reinstatement through the grievance process." (Plaintiff's First Amended Petition at 5). To provide this allegation, Plaintiff will have to demonstrate that Defendants' conduct cause her termination and prevented her reinstatement. (See March 23, 2001 Order at 11).

Plaintiff's breach of contract claim is arguably subject to the NLRA. Plaintiff alleges that CITGO entered into the CBA and breached that agreement by failing to provide her a fair and impartial arbitration proceeding. Clearly the terms of the CBA, the facts and reasons for Plaintiff's termination and the motives for the alleged misuse of the arbitration proceedings would be at issue.

In regard to her claim for abuse of process, Plaintiff claims that Defendants "wrongfully used the grievance process to substantiate and uphold her discharge." Plaintiff's First Amended Petition at 6. Inquiry into this state-law claim requires an evaluation of Plaintiff's termination and Citgo's motivation for firing Plaintiff as well as its process for executing the termination.

The NLRB would undertake precisely the same analysis identified by these three claims to determine whether CITGO committed an unfair labor practice in terminating Plaintiff. Such an analysis is within the sole jurisdiction of this Court. Therefore, this Court finds that Plaintiffs claims for intentional infliction of emotional distress, breach of contract and abuse of process are preempted by §8 of the NLRA and should be dismissed. The Court notes that where a dispute arises over an employer's action that is arguably an unfair labor practice but is also covered under a CBA, a district court retains jurisdiction with the NLRB to resolve the matter. See D.E.W., Inc. v. Local 93, 957 F.2d 196, 202 (5th Cir. 1992) (adopting Smith v. Evening News, 371 U.S. 195, 197, 83 S.Ct. 267, 269, 9 L.Ed.2d 246 (1962)). Here, Plaintiff's claims are completely preempted by §301, (See Order Denying Motion to Remand and Dismissing Certain Claims dated March 21, 2000) however the Court has found that Plaintiff is unable to assert a §301 claim, this court would retain jurisdiction with the NLRB pursuant to the rule in Smith.

IV. CONCLUSION

For the foregoing reasons, it is hereby ORDERED that Plaintiff's claims for intentional infliction of emotional distress, breach of contract, abuse of process and discrimination be DISMISSED with prejudice.

SIGNED and ENTERED this ____ day of November, 2001.

/S/_____
Janis Graham Jack
United States District Judge